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No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1982

W. DARRELL ZANG,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The petitioner, W. Darrell Zang, was charged in a sixteen count indictment with conspiracy, mail fraud, wire fraud, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The fraudulent scheme alleged in the Indictment involved the miscertification of domestic crude oil. This Petition presents the following questions of Constitutional magnitude.

1. Whether the Court of Appeals erred by failing to apply the principals previously enunciated by this Honorable Court to determine the intent of the United States Congress in enacting the Emergency Petroleum Allocation Act (E.P.A.A.), when it affirmed the ruling of the trial court that the express criminal provisions of the E.P.A.A. did not preempt, impliedly repeal, or control over the general criminal statutes.

2. Whether the Court of Appeals, by affirming the rulings of the trial court to exclude several exhibits offered by the petitioner, denied the petitioner his right to a fair trial, and therefore Due Process of Law.

3. Whether the Court of Appeals, by affirming the trial court's refusal to instruct the jury on the petitioner's theory of defense, denied the petitioner his right to a fair trial, and therefore Due Process of Law.

4. Whether the various standards established by the different courts of appeals to determine if a defendant is entitled to a theory of defense instruction has created such a conflict that this Honorable Court's guidance and supervision is appropriate.

5. Whether the decision of the Court of Appeals affirming the trial court's refusal to give the jury a lesser included offense instruction is in conflict with the applicable decisions of his Honorable Court.

PARTIES TO THE PROCEEDING

The petitioner, W. Darrell Zang, was the defendant when this case was tried in the United States District Court for the Northern District of Oklahoma, and the appellant when this matter was appealed to the United States Court of Appeals for the Tenth Circuit. Louis Porter was also a defendant in the District Court and an appellant in the Court of Appeals.

The United States of America was the plaintiff in the District Court and the appellee in the Court of Appeals.

TABLE OF CONTENTS

Page

Questions Presented ..... *i*

Parties to the Proceedings ..... *ii*

Table of Authorities ..... *iv-vi*

Opinions Below 1

Grounds for Jursidiction 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

Preemption of the General Criminal Statutes by the E.P.A.A. 5

Exhibits 6, 7, 8 and 9 7

Theory of Defense Instruction 9

Lesser Included Offense Instruction 12

Adoption of Arguments 14

Conclusion 14

Appendix A A-1

Appendix B B-1

Appendix C C-1

Appendix D D-1

Appendix E E-1

TABLE OF AUTHORITIES

Cases: Page

Beck v. United States,
305 F.2d 595 (10th Cir. 1962),
cert den. 83 S.Ct. 186 11

Bird v. United States,
180 U.S. 356 (1901) 9

Busic v. United States,
446 U.S. 398 (1980) 5, 6

Dranow v. United States,
307 F.2d 545 (8th Cir. 1962) 11

Hendrey v. United States,
233 F. 5 (6th Cir. 1916) 10

Keeble v. United States,
412 U.S. 205 (1973) 12, 14

Perez v. United States,
297 F.2d 12 (5th Cir. 1961) 10

Sansone v. United States,
380 U.S. 350 (1965) 12

Tatum v. United States,
190 F.2d 612 (D.C. Cir. 1951) 11

Taylor v. Kentucky,
436 U.S. 478 (1978) 10

United Brotherhood of Carpenters and Joiners of America v. United States,
330 U.S. 395 (1947) 10

United States v. Blane,
375 F.2d 249 (6th Cir. 1967) cert den. 88 S.Ct. 41 10

United States v. Blair,
456 F.2d 514 (3rd Cir. 1972) 10

United States v. Brown,
540 F.2d 364 (8th Cir. 1976) 11

United States v. Conroy,
589 F.2d 1258 (5th Cir. 1979),
cert den. 100 S.Ct. 60 10

United States v. Dana,
457 F.2d 205 (7th Cir. 1972) 11

United States v. Indian Trailer Corporation,
226 F.2d 595 (7th Cir. 1955) 11

United States v. Kahn,
381 F.2d 824 (7th Cir. 1967),
cert den. 88 S.Ct. 591 11

United States v. Wright,
593 F.2d 105 (9th Cir. 1979) 11

Statutes

15 U.S.C. § 751 *et seq.* 3, 5

15 U.S.C. § 754 ..... 2, 5, 6, 7, 12, 13

18 U.S.C. § 2 ..... 2, 3, 6

18 U.S.C. § 111 5

18 U.S.C. § 371 ..... 2, 3, 6

18 U.S.C. § 924(c) 5

18 U.S.C. § 1341 ..... 2, 3, 6

18 U.S.C. § 1343 ..... 2, 3, 6

18 U.S.C. § 1962 ..... 2, 3, 6

18 U.S.C. § 1963 ..... 2, 3, 6

18 U.S.C. § 3231 3

28 U.S.C. § 1254(1) 2

Regulations:

10 C.F.R. § 212.131 ..... 2, 5

Federal Rules of Criminal Procedure:

Rule 18 3

Rule 31(c) 2, 12

Federal Rules of Evidence:

Rule 401 ..... 2, 8

Rule 801(d)(2) 2, 9

Rule 803(8) 2, 9

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1982

W. DARRELL ZANG,
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v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

An appeal was taken from the District Court to the Temporary Emergency Court of Appeals and is reported at 645 F.2d 999, cert den. 454 U.S. 864. That appeal is not involved in this Petition.

The opinion of the United States Court of Appeals for the Tenth Circuit has not yet been published. It is set forth in Appendix A to this Petition.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1982. The petitioner, the appellant Louis Porter, and the United States, each filed a Petition for Rehearing. The Petitions for Rehearing filed by the petitioner and the co-appellant were denied on January 10, 1983. That Order of the Court of Appeals is set forth in Appendix B to this Petition. The Petition for Rehearing filed by the United States was denied on April 26, 1983. This Honorable Court has jurisdiction of this matter pursuant to Title 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes, regulations and rules:

15 U.S.C. § 754

18 U.S.C. § 2

18 U.S.C. § 371

18 U.S.C. § 1341

18 U.S.C. § 1343

18 U.S.C. § 1962

18 U.S.C. § 1963

10 C.F.R. § 212.131

Rule 31(c), Federal Rules of Criminal Procedure

Rule 401, Federal Rules of Evidence

Rule 801(d)(2), Federal Rules of Evidence

Rule 803(8), Federal Rules of Evidence

The pertinent text of these statutes, regulations and rules is set forth in Appendix E to this Petition.

STATEMENT OF THE CASE

On April 2, 1980, the petitioners were charged in an Indictment by a Grand Jury convened in the Northern District of Oklahoma. The United States District Court for the Northern District of Oklahoma had jurisdiction over this matter pursuant to Title 18 U.S.C. § 3231 and Rule 18, Federal Rules of Criminal Procedure. Count 1 of the Indictment alleged a violation of Title 18 U.S.C. § 371 (Conspiracy). Counts 2 through 7 alleged violation of Title 18 U.S.C. § 1341 and § 2 (Mail Fraud and Principals). Counts 8 through 15 alleged violations of Title 18 U.S.C. § 1343 and § 2 (Wire Fraud and Principals). Finally, Count 16 alleged violations of Title 18 U.S.C. § 1962(a), § 1963 and § 2 (Racketeer Influenced and Corrupt Organizations (RICO) and Principals). The Indictment is reprinted in Appendix C to this Petition.

The Indictment is a very unusual pleading. The first several pages contain an "outline" of various sections and provisions of the Emergency Petroleum Allocation Act (E.P.A.A.), Title 15 U.S.C. § 751 *et seq.*, and the regulations promulgated thereunder.

On April 10, 1980, the petitioners were arraigned before the District Court and entered pleas of not guilty. Thereafter, Motions to Dismiss were filed by both petitioners and after arguments were heard, the trial court denied the Motions to Dismiss. An interlocutory appeal was taken to the Temporary Emergency Court of Appeals (TECA). However, that court declined to consider the appeal because of lack of jurisdiction.

On September 15, 1980, a jury trial commenced on the Indictment. Verdicts of guilty on all sixteen counts were returned on October 1, 1980. The petitioners filed Motions in Arrest of Judgment and for Judgment of Acquittal or in the Alternative

for a New Trial. These were denied by the trial court on November 7, 1980. The court entered judgment of conviction and sentenced each petitioner to concurrent prison terms of five years on each count, fines totalling $49,000 and forfeiture of their ownership interest in the Dalco Building located at 2431 East 51st Street in Tulsa, Oklahoma.

The petitioners filed timely appeals to both the United States court of Appeals for the Tenth Circuit and TECA. On May 22, 1981, TECA dismissed the appeal, holding again that it lacked jurisdiction. The TECA opinion and order, which is not the subject of this Petition, was reported at 645 F.2d 999, cert. den. 454 U.S. 864.

The United States Court of Appeals for the Tenth Circuit filed its Opinion affirming the Order of the District Court overruling the petitioner's Motion to Dismiss, Motion in Arrest of Judgment, and Motion for Judgment of Acquittal or in the Atlerantive for a New Trial on June 7, 1982. The Court of Appeals did, however, remand the case to the District Court to establish the terms and conditions of the forfeiture.

The petitioners each filed a Petition for Rehearing and a suggestion that such rehearing be *in banc*. The Government also filed a Petition for Rehearing. The petitioners' Petitions for Rehearing were denied on January 10, 1983. The Petition for Rehearing filed by the United States was denied on April 26, 1983. It is from the denial of his Petition for Rehearing that the petitioner files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Several factors render this case extremely unusual and therefore worthy of this Honorable Court's consideration on certiorari. First, the Court of Appeals completely disregarded the principals recently enunciated by this Honorable Court

when it held that Congress did not intend that the express criminal provisions contained in the E.P.A.A. should preempt, impliedly repeal, or control over the general criminal statutes found in Title 18. Second, the petitioner was denied a fair trial, and therefore due process of law, when the courts below excluded his evidence in support of his primary defense and refused to allow that defense to be presented to the jury by the appropriate instructions. Third, there are significant differences in the standards currently being applied by the various courts of appeals to determine whether a defendant is entitled to have the jury instructed on his or her theory of defense. Fourth, the refusal of the courts below to give the jury a lesser included offense instruction is in direct conflict with the applicable decisions of this Honorable Court.

Preemption of the General Criminal Statutes by the E.P.A.A.

Recently, this Honorable Court decided *Busic v. United States,* 446 U.S. 398 (1980), which held that Title 18 U.S.C. § 111 preempted Title 18 U.S.C. § 924 (c). The petitioner respectfully submits that the rationale of *Busic* is applicable to the case at bar.

Here, as in *Busic*, two sets of statutes are involved. The Emergency Petroleum Allocation Act (E.P.A.A.), Title 15 U.S.C. § 751, *et seq.* established an administrative framework in which the nation's petroleum resources could be effectively managed. It authorized the President to promulgate regulations governing the management of those resources, and numerous such regulations were in fact promulgated. One of these regulations, 10 C.F.R. § 212.131, required the certification of domestic crude oil. Title 15 U.S.C. § 754 established both civil and criminal sanctions for the violation of these regulations.

The Indictment charged the petitioner with violating several sections of Title 18. Section 371 covers conspiracy. Sections 1341 and 1343 cover mail and wire fraud. Sections 1962 and 1963 involve the use of illegal income in an enterprise affecting interstate or foreign commerce. Section 2 defines aiding and abetting. The Indictment further alleged that the miscertification of domestic crude oil was the vehicle by which the petitioner committed these offenses.

Comparing the Indictment in this case with the E.P.A.A., one question in particular emerges—what was the intent of Congress in enacting 15 U.S.C. § 754? Did it intend that persons in the petitioner's position be prosecuted (1) under Title 18 only, (2) under either Title 18 or under 15 U.S.C. § 754 at the option of the Government, (3) under both Title 18 and § 754, or (4) under 15 U.S.C. § alone?

Busic v. United States, supra, provides several tools to resolve the question. First, there is the principle that ambiguities in criminal statutes should be resolved in favor of lenity. It should be noted that each of the Title 18 sections charged in the indictment, with the exception of § 2, carries its own penalty. Each of these penalties is substantially greater than the penalty provided for in 15 U.S.C. § 754.

Second, a specific statutes should be given precedence over a general statute. The conspiracy statute, the mail and wire fraud statutes, and the RICO statutes cover a multitude of violations. Title 15 U.S.C. § 754 covers *one* specific violation—the violation of the energy *regulations.* Section 754 is clearly much more specific.

Third, to hold that 15 U.S.C. § 754 does not preempt Title 18 is to hold that § 754 is useless. It was forseeable that someone might violate the energy regulations by miscertifying domestic

crude oil. It was also forseeable that in the sale of this miscertified oil the mails or wire transfers might be used, even if only peripherally. It was also foreseeable that two or more persons might be involved in the sale of such miscertified oil. Finally, it was forseeable that the proceeds of the sale would be invested in an activity touching interstate commerce. The mechanism to punish persons in the petitioner's position was in place prior to the enactment of § 754; however, Congress saw fit to provide an independent method of enforcing the energy *regulations*.

The petitioner respectfully submits that there is a positive repugnancy between Title 15 U.S.C. § 754 and the general criminal statutes found at Title 18, and because of this repugnancy, § 754 preempts and impliedly repeals Title 18 when viewed in the confines of this case. Furthermore, the decisions of the courts below are such a radical departure from the decisions of this Honorable Court that the exercise of this Honorable Court's power of supervision is appropriate.

Exhibits 6, 7, 8 and 9.

The petitioner's intent was the centrial, if not the only, factual issue at the trial of this case. The government argued that the petitioner intended to defraud the United States and the downstream purchasers of the crude oil by miscertifying that oil. The petitioner's defense was that he attempted to interpret and apply the regulations in good faith in determining his lawful selling price and therefore the appropriate certification.

In support of this defense, the petitioner attempted to introduce four exhibits into evidence. Exhibit 6 was a report to Congress by the General Accounting Office dated May 29, 1979, and titled *Improvements Needed in the Enforcement of Crude Oil Price Controls*. Exhibit 7 was a Memorandum from Richard Herzog, Deputy Administrator of the Department of

Energy, entitled "Reporting and Resolving Issues Impeding Compliance Audit of Crude Oil Resellers." Exhibit 8 was a Memorandum from Herbert Buchanan, Assistant Director of Compliance, Houston Office, Federal Energy Administration, to Carl Corrallo, with the Washington Office of the Federal Energy Administration. The subject of the Memorandum was "Information Requests Concerning Crude Resellers." Exhibit 9 was a memorandum to Jerry Von Tempske, Compliance & Enforcement, from Mary Ellen White, Office of Regional Counsel, concerning a telephone conversation with one Ken Jones, dated September 3, 1975.

These exhibits proved two facts. First, the regulations were extremely vague and ambiguous. They were so vague that personnel of the government that was prosecuting the petitioner were having problems interpreting and applying these regulations. Second, these exhibits show that the petitioner's interpretation of the regulations was reasonable, since the persons charged with enforcing the regulations were arriving at interpretations which were not dissimilar to the petitioner's.

The trial court excluded these exhibits on the grounds that they were not relevant and that they constituted hearsay and the Tenth Circuit affirmed that ruling.

The petitioner respectfully submits that the four offered exhibits were highly relevant to the trial of this action. Rule 401, Federal Rules of Evidence, which defines relevant evidence, provides that evidence is relevant if it tends to prove or disprove any fact of consequence to the determination of the action. The fact of consequence in the case at bar was the petitioner's intent to defraud the United States and the purchasers of the domestic crude oil. The petitioner's defense was that he arrived at the selling price and certification of the oil by a good faith application of the regulations, and he had not intent to perpetrate a

fraud. The reasonableness of the petitioner's interpretation of these regulations and the vagueness of these regulations tend to prove the petitioner's good faith and disprove intent on his part to perpetrate a fraud upon anyone.

The exhibits should not have been excluded as hearsay, rather, they were admissible on either one of two theories. First, they were admissions of a party, the United States, and therefore not hearsay as that term is defined in Rule 801(d)(2), Federal Rules of Evidence. Second, assuming, *arguendo,* that they were hearsay, these exhibits clearly fall into the exception provided for reports and statements of government agencies as set forth in Rule 803(8), Federal Rules of Evidence.

The petitioner respectfully submits that the wrongful exclusion of this evidence deprived him of the right to establish his primary defense and therefore denied him the right to a fair trial and due process of law.

Theory of Defense Instruction.

The error committed by the courts below in failing to admit the evidence offered by the petitioner was compounded by the courts' refusal to instruct the jury on the petitioner's theory of defense, i.e. that he determined his lawful selling price for domestic crude oil by a good faith interpretation of the applicable regulations. The petitioner's requested instructions are reprinted in Appendix D to this Petition.

As this Honorable Court has previously stated:

> It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement when the jury consequently fall into error, is sufficient reason for reversal.

Bird v. United States, 180 U.S. 356 at 362 (1901).

In *Taylor v. Kentucky,* 436 U.S. 478 (1978), this Court reversed the petitioner's conviction for the trial court's failure to give an instruction on the accused's presumption of innocence. Also see *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395 (1947).

Each of the Circuits which has considered the question has recognized the right of an accused to have the jury charged as to his theory of defense. However, the standards applied by the Circuits vary greatly. The petitioner respectfully submits that it would be appropriate for this Honorable Court to establish more tangible guidelines in this area and thereby insure a more uniform rule in the federal courts across the nation.

The Third Circuit appears willing to grant any requested instruction if there is any foundation in the evidence. *United States v. Blair,* 456 F.2d 514 (3rd Cir. 1972).

Numerous cases from the Fifth Circuit have addressed the question. Initially, that court was willing to allow an accused a theory of defense instruction if there was any evidentiary foundation. *Perez v. United States,* 297 F.2d 12 (5th Cir. 1961). However, the test has evolved such that the theory must have, "foundation in the evidence and legal support." *United States v. Conroy,* 589 F. 2d 1258 at 1273 (5th Cir. 1979) cert den. 100 S.Ct. 60.

The Sixth Circuit required in at least one case that the theory be distinct and important. *Hendrey v. United States,* 233 F. 5 (6th Cir. 1916). Additionally, that court requires a proper request on the part of the defendant and it will examine the instructions as a whole in deciding the question. *United States v. Blane,* 375 F.2d 249 (6th Cir. 1967) cert den. 88 S.Ct. 41.

There appears to be an internal conflict in the Seventh Circuit, as there are two distinct lines of cases arising from that

court. The first line of cases, represented by *United States v. Indian Trailer Corporation,* 226 F.2d 595 (7th Cir. 1955), holds that any evidence, no matter how tenuous, will support a theory of defense instruction. The other line of cases seems to require a greater quantum of evidence before a theory of defense instruction is warranted. *United States v. Kahn,* 381 F.2d 824 (7th Cir. 1967), cert den. 88 S.Ct. 591. Additionally, the Seventh Circuit places emphasis on the trial court's discretion in instructing the jury. *United States v. Dana,* 457 F.2d 205 (7th Cir. 1972).

The Eighth Circuit also shows deference to the trial court's discretion in allowing or disallowing a request by an accused for a theory of defense instruction. *Dranow v. United States,* 307 F.2d 545 (8th Cir. 1962). Furthermore, that court requires the defendant to show prejudice before it will disturb the trial court's ruling. *United States v. Brown,* 540 F.2d 364 (8th Cir. 1976).

Numerous decisions have been handed down by the Ninth Circuit. *United States v. Wright,* 593 F.2d 105 (9th Cir. 1979), appears to be typical in that it requires more significant evidentiary support for a theory of defense instruction. In addition, it requires that the theory of defense be legitimate.

The Tenth Circuit requires that the evidence reasonably support the theory of defense before the defendant is entitled to an instruction. *Beck v. United States,* 305 F.2d 595 (10th Cir. 1962), *cert den.* 83 S.Ct. 186.

The District of Columbia Circuit is perhaps one of the more liberal circuits in this regard. The landmark case, *Tatum v. United States,* 190 F.2d 612 (D.C. Cir. 1951), held that any evidence is sufficient to warrant the giving of a theory of defense instruction.

This brief survey is, of course, not meant to be exhaustive. However, it does demonstrate that there are substantial variations among the Circuits in this regard. Substantive guidelines from this Honorable Court would be most appropriate at this juncture. Such guidance would greatly assist the Circuits in this developing area of the law and would assure uniformity of decisions across the nation.

Furthermore, the petitioner respectfully submits that under *any* standard there was sufficient evidence in the record to support his requested instructions. The failure of the courts below to give the requested jury instructions deprived the petitioner of a fair trial and due process of law.

Lesser Included Offense Instruction

The petitioner respectfully maintains that he was entitled to a lesser included offense instruction, pursuant to Rule 31(c), Federal Rules of Criminal Procedure, which would have enabled the jury to find that he had violated the Emergency Petroleum Allocation Act and the regulations promulgated thereunder. Such a verdict by the jury would have subjected the petitioner to the criminal provisions found at Title 15 U.S.C. § 754 rather than the harsher penalties contained in Title 18.

This Honorable Court has settled this issue before; however, the courts below disregarded those decisions in refusing the petitioner's requested instruction. This Court has ruled that a defendant is entitled to a lesser included offense instruction when some of the elements of the offense charged are, in and of themselves, a crime. Furthermore, the element which distinguishes the greater and the lesser offenses must be in dispute. *Sansone v. United States,* 380 U.S. 350 (1965), *Keeble v. United States,* 412 U.S. 205 (1973).

An examination of the Indictment demonstrates that Title 15 U.S.C. § 754 is a lesser included offense of mail fraud and wire fraud as alleged in this case. In order to support a conviction under this Indictment, the government was required to prove that: 1) the petitioner miscertified domestic crude oil, 2) with the intent to defraud the United States and the downstream purchaser, and 3) the use of the United States mail or interstate wire facilities in furtherance of the scheme.

In order to sustain a conviction under Title 15 U.S.C. § 754, the government would have to prove that the petitioner willfully miscertified domestic crude oil

The use of the mails and wire facilities was never contested by the petitioner. Rather, the *only* issue at trial was the petitioner's intent: Did he intend to defraud the United States and the downstream purchasers of the crude oil, or did he arrive at his selling price and certification through a good faith, although possibly erroneous, interpretation of the applicable regulations? This is the critical issue which distinguishes the offense as alleged in the Indictment from a violation of the E.P.A.A. and its regulations.

This Honorable Court succinctly stated the petitioner's dilemma when Mr. Justice Brennan wrote:

> Morever, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from

> theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, supra, at 212-213 (Emphasis in original).

In this case, the petitioner was "exposed to the substantial risk that the jury's practice will diverge from theory," and that risk, in fact, materialized. The rulings of the courts below refusing the petitioner's requested lesser included offense instruction are in direct conflict with the prior decisions of this Honorable Court.

ADOPTION OF ARGUMENTS

The petitioner respectfully adopts the arguments and authorities presented by Louis Porter in his Petition for Writ of Certiorari where those arguments and authorities are appropriate and consistent with the argument and authorities presented herein.

CONCLUSION

There are several compelling reasons why this Honorable Court should grant certiorari. The courts below departed from the principals set forth in prior decisions of this Honorable Court when they failed to rule that Congress intended that the criminal provisions of the Emergency Petroleum Allocation Act preempt, impliedly repeal or control over the general criminal statutes found at Title 18 and when they failed to grant the lesser included offense instruction requested by the petitioner. The courts of the various Circuits, and the practitioners who practice before them, are in dire need of tangible guidance on when a theory of defense instruction is both appropriate and proper. Finally, the failure of the courts below to allow the petitioner to

introduce evidence on his primary defense and have the jury charged accordingly deprived the petitioner of a fair trial and due process of law.

WHEREFORE, the petitioner, W. Darrell Zang, prays that this Honorable Court issue its Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, reverse that court's judgment and remand this action to the United States District Court for the Northern District of Oklahoma for a new trial or for whatever proceedings this Honorable Court deems appropriate.

Respectfully submitted,

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APPENDIX A

6-7-82 80-2227 - 80-2228

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

SLIP OPINION

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

80-2227
80-2228

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Tenth Circuit
JUN 07 1982
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Clerk

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

W. DARRELL ZANG and LOUIS PORTER
Defendants-Appellants

Appeal From The United States District Court
For The Northern District Of Oklahoma
(D. C. No. 80-CR-33-E)

B. Hayden Crawford (Joe D. Dillsaver, with him on the brief), of Crawford, Crowe & Bainbridge, Tulsa, Oklahoma, for Defendant-Appellant W. Darrell Zang.

John A. Field, III, of Jerris Leonard & Associates, P.C., Washington, D.C. (James C. Lang and William J. Wenzel, of Sneed, Lang, Adams, Hamilton, Downie & Barnett, Tulsa, Oklahoma, Pat Malloy and Pat Malloy, III, of Malloy, Thompson & Malloy, Tulsa, Oklahoma, with him on the briefs), for Defendant-Appellant Louis Porter.

Stephen P. Learned, United States Department of Justice, Washington, D.C. (Frank Keating, United States Attorney for the Northern District of Oklahoma, Tulsa, Oklahoma, with him on the brief), for Plaintiff-Appellee.

Before SETH, Chief Judge, McWILLIAMS, Circuit Judge, and BRIMMER, District Judge*.

SETH, Chief Judge.

The defendants, W. Darrell Zang and Louis Porter, were convicted by a jury of one count of conspiracy (18 U.S.C. § 371), six counts of mail fraud (18 U.S.C. § 1341 and § 2), eight counts of wire fraud (18 U.S.C. § 1343 and § 2), and one count of racketeering (18 U.S.C. § 1962(a), § 1963, and § 2). The court sentenced each of the defendants to five years on each count to be served concurrently, a total fine of $49,000, and ordered the forfeiture, pursuant to 18 U.S.C. § 1963(a)(1), of the defendants' respective interests in Dalco Investments, which included an interest in the Dalco Building.

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*Honorable Clarence A. Brimmer, Chief United States District Judge for the District of Wyoming, sitting by designation.

The facts leading up to their indictment and conviction concern the purchase and resale of crude oil. The government alleged that from approximately December of 1976 through September of 1978 the appellants fraudulently miscertified over one million barrels of lower tier priced controlled crude oil as higher tier crude oil resulting in an illegal profit of nearly 7.5 million dollars.

Mr. Porter owned, among other businesses, a company known as Dalco Petroleum, Inc. which had as one of its wholly owned subsidiaries, Dalco Crude, Inc. (Dalco). In 1976 he formed Dalco Crude, Inc. to operate a crude oil and natural gas liquids trading business. Mr. Porter hired Mr. Zang to run the enterprise. Mr. Zang had previously been the vice president and regional manager of Western Crude Oil, Inc. (Western). As the manager of Dalco Crude Mr. Zang received an annual salary and an interest in the profits. Later in January of 1978 Dalco Crude, Inc. was succeeded by Dalco, Inc., a company owned jointly by Mr. Porter and Mr. Zang.

In December of 1976 Dalco negotiated with Cities Services (Cities) for the purchase of 310,000 barrels of low tier crude oil. Under that contract Dalco would pay Cities' acquisition cost which was based on posted prices for crude oil, the gathering charges or pipeline fees, plus 24 cents per barrel. Dalco simultaneously resold the crude to Western. Under the contract with Western Dalco received an acquisition cost based on posted prices, plus 19 cents per barrel.

The basis for the indictment was that Dalco recertified the lower tier crude oil from Cities as a high tiered crude oil and thus a higher priced crude, when it was resold to Western. The then prevailing price control regulations required the producer to certify the tier of the oil sold and each reseller was required to

certify the crude to its purchaser to be of the same tier as the certification it received. The certification was usually typed on the reseller's invoice. As a reseller Dalco was thus required to pass onto Western the same tier designation it had received for the oil. Because of the fraud perpetrated through miscertification the government alleged that Dalco overcharged Western $7,482,837.

Similar arrangements were negotiated between Cities and Western through July of 1978. Dalco negotiated for the purchase and resale of about 15,000 barrels per day, and over a fifteen-month period 7,629,442 barrels were traded in this manner.

Mr. Porter claims that he had no involvement in the transaction except for financing. He claims that Mr. Zang was in charge of preparing the invoices and that he was never aware of any violations until September or October of 1978. Mr. Zang claims that he did not intend to defraud Western, downstream purchasers, or the United States. He argues that he made a good-faith effort to comply with what he described as the confusing and complicated pricing and certification regulations. The appellants advance several points on appeal:

1. What had become known as the BAC invoice and Falcon letter were improperly admitted into evidence;
2. The conspiracy convictions were not supported by the evidence;
3. The trial court should have dismissed the RICO count;
4. Several of the defendants' exhibits concerning the DOE regulations were improperly excluded;
5. The trial court wrongfully denied defendants' requested jury instructions;

6. The Emergency Petroleum Allocation Act (EPAA) implicitly preempts Title 18.

The appellants argue that the BAC invoice and the Falcon letter were improperly admitted as false exculpatory evidence. These documents resulted from an attempt by Mr. Zang and Mr. Porter to cover up the crude oil certification imbalance. Thus on March 31, 1978 Mr. Porter had prepared and placed in Dalco's file an invoice from BAC Petroleum billing Dalco $275,000 as BAC's commission for arranging Dalco's purchase of foreign crude from Falcon Petroleum, Ltd. This transaction allegedly occurred in March and April of 1978 in an effort to balance Dalco's incoming and outgoing crude oil tier certification. This liability was questioned in late August of 1978 when an outside auditor asked why the liability had not been paid. Mr. Porter explained that since Dalco was unable to obtain port facilities the offer of foreign crude oil had to be turned down, but he and John Draughon, his business partner from BAC, agreed to the $275,000 commission.

However, the accountants requested confirmation of this liability. Mr. Porter explained that confirmation would be difficult to obtain since Mr. Draughon was reluctant to claim an interest in the foreign company, Falcon, because of tax reasons. On September 8, 1978 Mr. Porter dictated a letter to Allen McNaughton of Falcon Petroleum in Bermuda. The letter recounted the alleged transaction and requested that Dalco be allowed to withhold payment temporarily. At Mr. Porter's direction no file copies were made and one copy was sent to Dalco's controller to show the outside auditors. This "Falcon letter" was returned marked "addressee unknown." Mr. Porter told his secretary to forget about it. However, based on the BAC invoice, the Falcon letter, and Mr. Porter's assurances that the transaction was valid, the liability was left on the books at

the end of the year. The record demonstrates that Mr. Draughon had no such interest in Falcon Petroleum. Falcon Petroleum did not exist and Dalco never had such a foreign crude oil transaction.

The appellants claim that the BAC invoice and the Falcon letter are not really false exculpatory evidence. They argue that the foreign crude oil transaction meant to balance their certificates would not have exculpated them on the government's theory of fraud. And, even if it was proper false exculpatory evidence, they argue it cased unfair prejudice and confusion so the trial court should have excluded it.

Falwe exculpatory statements made by a defendant are admissible to prove circumstantially consciousness of guilt or unlawful intent. *United States v. Ingram,* 600 F.2d 260 (10th Cir.); *United States v. Tager,* 481 F.2d 97 (10th Cir.). Such statements cannot be considered by the jury as direct evidence of guilt. *United States v. Boekelman,* 594 F.2d 1238 (9th Cir.).

The trial court admitted these documents noting that the evidence was allowed to show intent. The trial court carefully instructed that a defendant's attempt to fabricate evidence after an alleged violation of the law is not sufficient to establish guilt.

The appellants argue that the evidence concerns balancing Dalco's tier inventory, which is unrelated to the fraud charges. We disagree. Miscertification was the method by which the fraud was perpetratred. The invoice and the letter were attempts to prevent the detection of the tier miscertification. Thus we find that there was no error in admitting the documents as false exculpatory evidence. The judge fully instructed the jury on the use of such evidence; therefore, it was for the jury to weigh the testimony and the evidence and determine whether the false ex-

culpatory evidence indicated a consciousness of guilt or nothing at all. See *United States v. Ingram,* 600 F.2d 260 (10th Cir.).

The balancing of the probative value of evidence against its prejudicial effect is left to the discretion of the trial court. We will reverse only for a clear showing of abuse of discretion. *United States v. Harris,* 534 F.2d 207 (10th Cir.). The evidence was offered for a specific purpose, the jury was properly instructed, and thus the invoice and letter were properly admitted into evidence.

As to the conspiracy charge, the appellants contend that the evidence was insufficient to support the jury's verdict. Specifically they argue that the government never produced evidence of an unlawful agreement between them.

We have held in many cases that the agreement in a conspiracy may be either express or implied, and that the parties must have a meeting of the minds in the common design, purpose, or objects of the conspiracy. *United States v. Lopez,* 576 F.2d 840 (10th Cir.); *United States v. Butler,* 494 F.2d 1246 (10th Cir.). Frequently the agreement to cooperate is not susceptible of direct proof because the nature of the crime and the unlawful agreement may be established by circumstantial evidence. *United States v. McMahon,* 562 F.2d 1192 (10th Cir.); *McManaman v. United States,* 327 F.2d 21 (10th Cir.). In determining the sufficiency of the evidence the inferences drawn are reviewed in the light most favorable to the government. *United States v. Erb,* 596 F.2d 412 (10th Cir.). Thus the conspiracy conviction will be sustained if from the circumstances, acts, and conduct of the appellants it can reasonably be inferred that they agreed to miscertify the crude oil with the intent to defraud. See *United States v. Parnell,* 581 F.2d 1374 (10th Cir.); *United States v. Anderson,* 352 F.2d 500 (6th Cir.).

Mr. Porter formed Dalco Crude, Inc. which later became Dalco, Inc. primarily for crude oil resale. The volume of business in the fifteen-month period was large and the transactions grossed some $7,595,964 in profit, of which only $93,129 represented legitimate profit. To obtain the multimillion dollar letters of credit to cover the monthly crude oil purchases Mr. Porter and Mr. Zang signed personal loan guarantees. Additionally, Mr. Porter pledged the stock of his public company, Great Yellowstone Corporation, as a guarantee. The financial stakes were high for both Mr. Porter and Mr. Zang. The volume of oil traded, the personal guarantees, and the inordinately high profits make the transaction one in which the jury could reasonably infer that Mr. Porter was well aware of the nature, scope, and value of the transactions. Also, it may be readily inferred from the evidence that Mr. Zang and Mr. Porter worked together to design the scheme and to attain its objective.

The governemnt also introduced evidence directed to Mr. Porter's knowledge of the very high profits. In early January of 1977 two Dalco auditors spoke with Mr. Porter about the Cities-Western transaction. They had noticed that the outgoing invoices certified the 310,000 barrels of crude oil at a higher tier designation than had the incoming invoices for the same crude oil. Althought they knew very little about the federal pricing and certification regulations, they did realize that the transaction cleared unusually high profits. Richard Clark, a subsidiary company president, also testified that he reviewed the regulations and concluded that the transaction was possibly illegal. All three testified that they told Mr. Porter about the problem and he simply referred them to Mr. Zang. All three resigned shortly thereafter citing as the reason the manner in which the crude oil trading was being handled.

In early March of 1978 the accounting firm of Haskins and Sells examined invoices dated in December of 1977 as part of a fee proposal. These invoices indicated that Dalco resold 750,000 barrels of crude oil at a penny less per barrel than it had paid for it. Nevertheless Dalco grossed a $450,000 profit. This was accomplished by changing the low tier certification to upper tier crude and stripper. These accountants testified that they pointed out the irregularity to Mr. Porter and showed him the invoices. Mr. Zang had told them that he was trying to "balance" the tiers. Furthermore he told them that they must review the entire year to determine if the tier certifications were balanced. The auditors requested documentation but they never received any and consequently the firm resigned from the autit. About the same time Dalco's auditor also resigned.

In the summer of 1978 Mr. Porter engaged the accounting firm of Peat, Marwick and Mitchell to audit both Great Yellowstone Corporation and Dalco. The Peat Marwick auditors pointed out the tier imbalances on the invoices. The firm requested exchange and certification schedules for the entire year from Mr. Porter. Although Dalco never provided those schedules, Peat Marwick prepared a crude oil trading schedule for Dalco based on the auditing information it had gathered. Their audit showed that a tier imbalance existed for the entire year.

Throughout this fifteen-month period Mr. Porter had control over the Dalco profits. Three of the other companies received a portion of the gross profit from each trade. Mr. Zang and Mr. Porter created a partnership, Dalco Investments, which received a handling charge of 25 cents per barrel of oil traded.

Mr. Porter testified that he had nothing to do with the crude oil sales to Western, except for financing. He testified that

he was unaware of any DOE violations until late September or early October of 1978. He claims that in arranging the financing of the oil trading, he only generally knew that Dalco was buying and selling the crude oil. He claimed that he had never specifically read the contracts. Additionally he denied ever being told by Haskins and Sells or any other auditors that the crude oil transactions looked illegal.

The evidence discloses that the oil tier certification systematically enabled Mr. Porter and Mr. Zang to make an inordinately large profit. Their financial investment in the venture was substantial. Evidence indicated that Mr. Porter was told repeatedly that regulations may have been violated and perhaps the transactions were illegal. Mr. Porter's agreement with Mr. Zang can be inferred from Mr. Porter's refusal to investigate the irregularities pointed out by auditors, his association and business ties with Mr. Zang which led to unusually high profits, and the fact that he had a large personal stake in the transaction. From this evidence and its reasonable inferences, a jury could reasonably infer that there was an informed and interested cooperation between Mr. Zang and Mr. Porter to recertify the crude oil invoices in order to defraud Wetern, and consequently the downstream buyers and the United States.

The appellants also contend that the evidence is insufficient to prove that they conspired to defraud the United States. The indictment charged the defendants with fraud against the United States in its Entitlements Program under the Emergency Petroleum Allocation Act (EPAA).

The Entitlements Program, 10 C.F.R. § 211.67, was a method of equalizing the acquisition costs of a refiner's crude oil. Under the program refiners who purchased and processed lower priced "old" oil in excess of the national average were re-

quired to compensate by cash payment the refiners who purchased and processed more expensive "new" oil. The tier designations enable the government to determine the entitlement. If lower tiered crude oil is miscertified as higher tiered crude then the entitlement is deflated.

The government introduced evidence that barrels of crude purchased by Western from Dalco were later sold to Gulf Oil and OKC. Mr. Mills of Western so testified. Tom Fagan and John Madden of Gulf Oil and OKC testified that their respective companies bought crude from Western. OKC was a refiner. Gulf reported its tier information at its refineries to DOE. Reviewing the evidence in the light most favorable to the government, it is reasonable for a jury to infer and find that the miscertification of lower tier crude oil impacted upon and disrupted the Entitlements Program administered by DOE. Where there is sufficient evidence to show that a federal program has been disrupted, the evidence is sufficient to support the finding of fraud against the United States. See *United States v. Johnson,* 383 U.S. 169.

The appellants next contend that the evidence is insufficient to support their convictions of mail fraud. They argue that the mailings were not sufficiently related to the alleged scheme to defraud, and thus their conduct was not within the mail fraud statute.

To warrant a conviction under the mail fraud statute the government must prove that a scheme to defraud exists and that a mailing was made for the purpose of that scheme. *United States v. Wolf,* 645 F.2d 23 (10th Cir.). The appellants argue that the indictment charged them with fraudulent miscertification of crude oil tiers on the invoices. They contend that the method of delivering the invoices was irrelevant to the legality of the transaction.

The mail fraud statute requires that the mails be an integral part of the scheme to defraud. *United States v. Maze,* 414 U.S. 395. This means that the item mailed be an integral part of the execution of the scheme. In this way the use of the mails becomes "incident to an essential part of the scheme." *Pereira v. United States,* 347 U.S. 1. See also *United States v. Kent,* 608 F.2d 542 (5th Cir.). Clearly the scheme to defraud depended upon the invoices stating the tier certification. Mailing those invoices was necessary and an integral part of the scheme. Thus the mail fraud counts are supported by the evidence.

The appellants claim several errors with respect to the application of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §§ 1961-1968. In Count 16 of the indictment Mr. Zang and Mr. Porter were charged with receiving monies from a pattern of racketeering and willfully investing that income to acquire an interest in violation of 18 U.S.C. § 1962(a). The racketeering activity alleged consisted of the acts of mail and wire fraud also alleged in the indictment. The indictment further contended that Mr. Zang and Mr. Porter transferred to Dalco Investments approximately $1,067,576 of the profit obtained from the Cities-Western transaction. The government sought forfeiture of the appellants' respective interests in Dalco Investments, including its sole asset, the Dalco Building, pursuant to § 1963(a)(1).

Under RICO the government must prove both the existence of an enterprise and a connected pattern of racketeering activity. *United States v. Turkette,* 452 U.S. 576. Mr. Porter and Mr. Zang each owned a 50% interest in a partnership called Dalco Investments. The partnership received a handling fee for the Cities-Western crude oil transactions. This constituted an ongoing association for the purpose of engaging in interstate com-

merce. It was a separate element proved by the government. Thus Dalco Investments was an "enterprise" within the meaning of the RICO statute. As the Court said in *Turkette:*

> "RICO also proscribes the investment of income derived from racketeering activity in an enterprise engaged in or which affects interstate commerce. . . . "

The pattern of racketeering activity is a series of criminal acts as defined by the statute. *United States v. Turkette,* 452 U.S. 576. In the case before us racketeering activity was the alleged wire and mail fraud. § 1962(1)(B). To prove a pattern, the government must establish two or more predicate offenses which are related to the activities of the enterprise. *United States v. Scotto,* 641 F.2d 47 (2d Cir.). The jury found the appellant guilty on all counts of mail and wire fraud. Those predicate acts concerned the fraudulent miscertification of crude oil tiers in the Cities-Western transactions. As such they were sufficiently related to the appellants' enterprise of selling crude oil to support the conviction under § 1962.

The appellants claim error in the trial court's instruction to the jury concerning the "pattern of racketeering." The court instructed the jury that to find "a pattern of racketeering activity the law requires at least two acts of racketeering activity." The appellants argue that the trial court's instruction should have also specifically stated that the two acts had to be related to constitute a pattern.

On review we must consider the trial court's instruction as a whole. The trial court instructed the jury that an activity of racketeering includes any act which constitutes a violation of the mail or wire fraud statutes. The court further stated that if the government proved at least two of the wire and mail fraud counts then the pattern of racketeering activity would also be

sufficiently proven. See *United States v. Weatherspoon,* 581 F.2d 595 (7th Cir.). Any two of the counts of mail and wire fraud alleged in the indictment were sufficiently related to the enterprise to constitute a violation of RICO. Based on the instructions as a whole, there was no need to explain specifically the required relationship.

The appellants also contend that they were wrongfully denied a special verdict under rule 31(e) of the Federal Rules of Criminal Procedure. This rule provides that "a special verdict whall be returned as to the extent of the interest or property subject to forfeiture, if any." 18 u.s.c. rule 31(e).

The appellants never made a timely request for a special verdict. The court asked the parties to review the verdict form and no objections were made. Once the jury began deliberations the appellants' attorneys brought the rule to the court's attention. However, they objected to any communication from the court to the jury to remedy the problem. They contended that it would be "reversible error and prejudicial to advise the jury on it [special verdict] during their deliberations because it would bring undue emphasis on this particular count [16]."

The trial court ruled that the parties had waived their right to a special verdict. It also determined that the defendants suffered no prejudicial error because the indictment specifically alleged only one enterprise interest subject to the forfeiture provision. Since the evidence was uncontroverted as to the defendants' interests in the partnership the court concluded that there was no issue of fact concerning the tracing of funds or determining specific property to be forfeited.

There was no error in the use of a general verdict in this case. The parties can waive their right to a special verdict by not making a timely request See *United States v. Desmond,* 670

F.2d 414 (3d Cir.); *United States v. Jones,* 425 F.2d 1048 (9th Cir.). In this case the appellants waived their right and no plain error resulted. The evidence was uncontroverted so no factural issues were left to be decided by the jury. The indictment and jury instructions were about the partnership interests involved. By finding the defendants guilty of Count 16, the jury invoked the forfeiture provisions. See *United States v. L'Hoste,* 609 F.2d 796 (5th Cir.). Thus there was no reversible error in not using the special verdict.

The appellants also contend that the forfeiture of their interests in Dalco Investments, particularly the Dalco Building, was not supported by the weight of the evidence. The government sought forfeiture under 18 U.S.C. § 1963(a)(1) which provides that any person found in violation of §1962 shall forfeit any interest acquired or maintained in violation of § 1962. Even though the "interest" is not specifically defined by the statute, its meaning can be derived from the activities barred by § 1962. The section proscribes three types of activities. The defendants were charged with violating § 1962(a), which prohibits the use or investment of racketeering income to acquire an interest in any enterprise. Thus the interest subject to forfeiture in this case is any interest in an enterprise acquired or maintained through racketeering income.

The enterprise at issue is Dalco Investments, a partnership equally held by Mr. Zang and Mr. Porter. Under the evidence adduced at trial the partnership's sole asset is the Dalco Building. Mr. Porter had transferred a half-interest in the building to Mr. Zang for value. They each contributed their share in the building to the partnership. The partnership received over a million dollars from the Cities-Western transactions, which was in turn used to pay the mortgage on the building.

The appellants' interest in Dalco Investments which was acquired by tained funds is subject to forfeiture. See *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir.). Merely contributing the building to a partnership is not prohibited by § 1962. See *United States v. Mandel,* 591 F.2d 1347 (4th Cir.). Thus the entire building is not necessarily subject to forfeiture. However, the partnership's interest in the building which was acquired by racketeering funds is subject to forfeiture under § 1963.

The government presented precise, uncontroverted evidence as to the amount of racketeering income funneled into Dalco Investments. It totaled $1,067,576. The untainted interests which may exist and the interests of innocent third parties should be protected. Thus we remand this issue to the district court to establish terms and conditions of the forfeiture under its authority described in 18 U.S.C. § 1963(c).

The appellants claim that the trial court improperly excluded exhibits 6, 7, 8, 9, and the unpurged portion of exhibit 3. The defendants offered exhibits 6, 7, 8, and 9 in an effort to show that the pricing regulations for crude oil were confusing and vague. The trial court excluded those exhibits on the grounds of relevancy. The relevancy of evidence offered at trial is within the discretion of the trial court. We will not reverse on appeal unless the trial court abused its discretion. *United States v. Montgomery,* 582 F.2d 514 (10th Cir.); *United States v. Ray,* 488 F.2d 15 (10th Cir.).

The defendants were charged with fraud, not with violating federal price controls. Under the indictment the scheme to defraud was executed through the miscertification of the tier of crude oil sold. Pricing violations were not included in the indict-

ment and no evidence was offered that the defendants relied upon those documents for their interpretation of federal certification regulations. Thus the exhibits were properly excluded.

Exhibit 3 is a letter from a Washington law firm to the Economic Regulatory Administraton on behalf of Dalco. The letter was written on October 24, 1978. The appellants argue that the letter contains the corporation's interpretation of the regulations which is relevant of the appellants' intent. The court excluded part of the letter constituting a legal opinion, but admitted the factual portions. The court determined that the legal opinion expressed in the letter was like an expert opinion by a witness who was unavailable for cross-examination. We find no abuse of the trial court's discretion in disallowing the admission of that portion of the letter constituting a legal opinion.

The appellants claim error in the trial court's refusal to give a number of the defendants' requested jury instructions. The admission or exclusion of a jury instruction is within the discretion of the trial court. However, a defendant is entitled to an instruction if there is support in the evidence and the law. *United States v. Prazak,* 623 F.2d 152 (10th Cir.).

The trial court denied the appellants' pricing and certification instructions because they were argumentative. Further under the indictment and evidence presented at trial, the pricing regulations were irrelevant. Compliance or noncompliance with the pricing regulations does not affect the application of the criminal statute. The trial court correctly denied those instructions.

The defendants requested a lesser included offense instruction which was denied by the trial court. The defendants argue that the lesser included offense was a violation of 15 U.S.C. § 754, which makes a violation of the EPAA certification regula-

tions a misdemeanor. A defendant is entitled to a lesser included offense instruction when the lesser offense is established by the evidence adduced at trial. *United States v. Pino,* 606 F.2d 908 (10th Cir.). Additionally, however, an inherent relationship must exist between the two offenses. This does not exist here. A review of the considerations suggested in *United States v. Whitaker,* 447 F.2d 314 (D.C. Cir.), indicates that regulatory violations are not lesser included in offenses of conspiracy, mail or wire fraud, or racketeering. The elements, proof, and interests protected differ greatly. Thus the trial court did not abuse its discretion by denying the instruction.

The good-faith instructions requested by the defendants cannot be reviewed because the defendants never made a proper objection at the time of trial. There is no evidence that the defendants made a specific objection to the denial of these instructions. A generalized objection is insufficient to the matter objected to and the grounds for the objection as required by rule 30. *Maxfield v. United States,* 360 F.2d 97 (10th Cir.).

The appellants also claim that the EPAA regulations preempt or impliedly repeal the Title 18 criminal statutes. Under the EPAA regulations the crude oil reseller can be charged with a misdemeanor for miscertification. Mr. Porter and Mr. Zang were not charged with a violation of that statute, but rather they were charged with criminal violations.

An implied repeal requires a positive repugnancy between the provisions of the two laws. *United States v. Batchelder,* 442 U.S. 114; *Wood v. United States,* 41 U.S. 341. Nothing in the legislative history of the language of the statute indicates a desire by the Congress to make the EPAA the exclusive remedy

for miscertification of oil tiers. In *Posadas v. National City Bank,* 296 U.S. 497, the United States Supreme Court said:

> "[R]epeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. . . . [T]he intention of the legislature to repeal must be clear and manifest."

Since we cannot find any intention of Congress to repeal or preempt the criminal statutes by the EPAA, we affirm the trial court's denial to dismiss the indictment.

The appellants' convictions are affirmed, but the case is remanded on the issue of forfeiture, consistent with this opinion.

APPENDIX B

NOVEMBER TERM – January 10, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges and Honorable Clarence A. Brimmer, Jr.*, District Court Judge.

Nos. 80-2227
80-2228

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

LOUIS PORTER and W. DARRELL ZANG
Defendants-Appellants

This matter comes on for consideration of the petitions for rehearing and suggestions for rehearing in banc filed by appellants in the captioned appeals.

The petitions for rehearing were denied by the judges of the panel that rendered the decision sought to be reheard.

The suggestions for rehearing in banc were transmitted by the clerk to the members of the panel and to the judges who are in regular active service but none requested a vote on the suggestions made by the parties.

Upon consideration whereof, the petitions for rehearing and suggestions for rehearing in banc are denied.

S/S Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Wyoming, sitting by designation.

APPENDIX C

Criminal No. 80-CR-33-C
(T. 18 U.S.C. §§371, 1341, 1343, 1962(a), 1963 & 2)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APR 2 1980
Jack C. Silver, Clerk
U.S. DISTRICT COURT

United States District Court)
Northern District of Oklahoma) ss

I hereby certify that the foregoing is a true copy of the original on file in this Court.

Jack C. Silver, Clerk

By S/S H. Owen
Deputy

Bond set by the Court in
the amount of $ P.R.
Dated 4-2-80

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

W. DARRELL ZANG and LOUIS PORTER
Defendants-Appellants

INDICTMENT

The Grand Jury Charges

That at all times material herein:

COUNT 1

A. INTRODUCTION

1. There was in existence the Emergency Petroleum Allocation Act (EPAA) of 1973, Title 15, United States Code, Section 751, *et seq.*, and the regulations promulgated thereunder, which provided for price controls and mandatory allocation of all crude oil produced in or imported into the United States.

2. In order to require a producer, seller, or reseller of domestic crude oil to maintain its historic profit margin with respect to designated portions of said crude oil and not to reap windfall profits in a rising price market, the Federal Energy Administration (FEA) and its successor agency, the United States Department of Energy (DOE), agencies of the United States, administered within the Mandatory Petroleum Price Regulations a multi-tier pricing system under which the price that may be charged for domestic crude oil was dependent on the regulatory category of the crude oil.

3. The regulatory categories "old" (also referred to as "lower tier"), "new" (also referred to as "upper tier"), and "stripper" were strictly price control categories and were not based upon any physical or chemical characteristics of the crude oil but were based upon the history or the level of production from an oil producing property. 10 C.F.R. §§212.71-212.74.

4. "Old" oil (lower tier) had the lower maximum lawful selling price adjusted to the May 15, 1973 selling price for crude oil of like grade and quality coming from the same oil producing

property at or below a designated level of production in 1972. "New" oil (upper tier) which referred to crude oil discovered since 1972 or oil obtained from producing properties in excess of the properties' 1972 level of production, had a higher maximum lawful selling price. "Stripper" oil, defined as that crude oil produced from a property whose average daily production per well did not exceed ten barrels per day during the qualifying period, was exempt from price controls and could be sold at the world market price. 10 C.F.R. §212.54.

5. The Mandatory Petroleum Price Regulations provided for a certification requirement with regard to the purchase and sale of domestic crude oil.

6. In the beginning of the relevant time period herein, said certification program, as set forth within the Mandatory Petroleum Price Regulations, provided in pertinent part at 41 F.R. 37309 (September 3, 1976), 10 C.F.R. §212.131(b) (1), that

> Each seller of domestic crude oil, other than a producer of domestic crude oil . . . shall, with respect to each sale of domestic crude oil . . . certify in writing to the purchaser the respective volumes of and respective per barrel prices for the old crude oil, new crude oil, stripper well crude oil, and other domestic crude oils the first sale of which is exempt from the provisions of this part included in the volume of domestic crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part.

Although amended in immaterial respects from time to time during the relevant time period at 42 F.R. 41565 (August 17, 1977); 42 F.R. 62897 (December 14, 1977); 42 F.R. 64956 (December 29), 1977; 43 F.R. 26540 (June 20, 1978); and 43 F.R. 33679 (August 1, 1978); this provision of the certification program remained in effect throughout the relevant time period.

7. There was also in existence a regulation requiring firms subject to the Mandatory Petroleum Price Regulations to maintain records sufficient to demonstrate that prices charged were in compliance with the Mandatory Petroleum Price Regulations and to make said records available upon request to the FEA or its successor agency, the DOE. 10 C.F.R. §210.92(a) and (b).

8. The Mandatory Petroleum Allocation Regulations, promulgated by the FEA and its successor agency, the DOE, under authority of the EPAA provided for the allocation of price-controlled domestic crude oil among domestic refiners under what is referred to as the "Entitlements Program." 10 C.F.R. §211.67. The Entitlements Program was maintained by the FEA and the DOE to adjust cost inequities to refiners which result from the multi-tier pricing system for domestic crude oil. Domestic refiners, under the Program, who had purchased and processed lower priced "old" oil (lower tier crude oil) in excess of the national average, determined monthly by the FEA and the DOE from reports filed by the refiners, must compensate those refiners who had purchased and processed more expensive "new" oil (upper tier crude oil) or price exempt oil thereby tending to equalize the acquisition costs for said domestic refiners.

9. CITIES SERVICE COMPANY (hereinafter "Cities Service"), a recent successor by merger of CITIES SERVICE OIL COMPANY, was a corporation organized under the laws of Delaware with its principal office in Tulsa, Oklahoma, and was engaged in the production, sale, and transportation of crude oil.

10. WESTERN CRUDE OIL, INC. (hereinafter "Western") was a corporation organized under the laws of Delaware with its principal office in Denver, Colorado, and was engaged in the business of buying, selling, and transporting crude oil.

11. GREAT YELLOWSTONE CORPORATION, presently existing and operating under the name of DALCO PETROLEUM CORPORATION, was a corporation organized under the laws of the State of Nevada, having its principal place of business in Tulsa, Oklahoma, and was engaged in the general oil and gas business and in the manufacture of insulation products and steel fabrication.

12. DALCO, INC., was a corporation organized under the laws of the State of Oklahoma, with its principal office in Tulsa, Oklahoma, was engaged in crude oil trading, and on May 31, 1978 became a subsidiary of GREAT YELLOWSTONE CORPORATION.

13. DALCO CRUDE, INC., was a corporation organized under the laws of the State of Oklahoma, with its principal office in Tulsa, Oklahoma, was engaged in crude oil trading, and was a subsidiary of DALCO PETROLEUM, INC.

14. DALCO PETROLEUM, INC., was a corporation organized under the laws of the State of Oklahoma, with its principal office in Tulsa, Oklahoma, was engaged in the general oil and gas business, and on May 31, 1978, became a subsidiary of GREAT YELLOWSTONE CORPORATION.

15. LOUIS PORTER, chairman of the board and chief executive officer of GREAT YELLOWSTONE CORPORATION owned all or part of the stock of, and controlled, GREAT YELLOWSTONE CORPORATION, DALCO, INC., DALCO CRUDE, INC., and DALCO PETROLEUM, INC.

16. W. DARRELL ZANG, a director of and second largest stockholder of GREAT YELLOWSTONE CORPORATION, was a part owner of DALCO, INC.

17. DALCO INVESTMENTS was a partnership, operating under the laws of Oklahoma, and at all times material

herein was owned fifty per cent (50%) each by LOUIS PORTER and W. DARRELL ZANG, and constituted an "enterprise" as defined by Title 18, United States Code, Section 1961(4), which was engaged in activities which affect interstate commerce.

B. THE CONSPIRACY AND ITS OBJECTS

18. Beginning in approximately December, 1976 and continuing up until approximately September, 1978, within the Northern District of Oklahoma and elsewhere, defendants

W. DARRELL ZANG and LOUIS PORTER

knowingly, willfully, and unlawfully combined, conspired and agreed with each other to commit certain offenses against the United States, to-wit:

(a) to use the mails, and cause the use of the mails in furtherance of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from Western and to defraud indirectly others unknown who were subsequent purchasers of crude oil obtained from Western or from each other, in violation of 18 U.S.C. §1341;

(b) to transmit, and cause to be transmitted, in interstate commerce by means of wire communication, certain signs, writings and sounds for the purpose of executing a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from Western and to defraud indirectly others unknown who were subsequent purchasers of crude oil obtained from Western or from each other, in violation of 18 U.S.C. §1343; and

(c) to defraud the United States of America, and in particular, the Federal Energy Administration and its successor agency, the Department of Energy, of their right to have the Mandatory Petroleum Price Regulations promulgated by those agencies administered honestly, fairly, and free from corruption, fraud, deceit, deception, concealment, and unlawful means.

C. MEANS OF THE CONSPIRACY AND OF THE SCHEME AND ARTIFICE TO DEFRAUD BOTH WESTERN AND THE UNITED STATES

19. Among the manner and means employed by the defendants W. DARRELL ZANG and LOUIS PORTER to effectuate the objects of the aforesaid conspiracy and to further the scheme and artifice to defraud were the following:

(a) The defendants would cause DALCO CRUDE, INC., and later DALCO, INC. (hereinafter referred to interchangeably as "DALCO"), owned by and/or controlled by defendants, to enter into a series of contracts with Cities Service, whereby Cities Service would sell quantities of West Texas and New Mexico crude oil to DALCO which crude oil, at the time of sale, was in pipelines or in storage terminals attached to pipelines in the West Texas area.

(b) The defendants would cause DALCO to enter into a corresponding series of contracts with Western whereby DALCO would sell to Western the same crude oil in the West Texas pipelines or storage terminals that DALCO had purchased from Cities Service. With the exception of certain gathering and handling charges, the contracts with Western provided that DALCO would charge Western for the crude oil delivered no more than what DALCO paid Cities Service for said crude oil.

(c) In submitting invoices to Western under these contracts, defendants would falsely and fraudulently certify that certain portions of the crude oil sold was new oil (upper tier) or stripper oil when, in truth and in fact, as defendants well knew, said portions of crude oil was old oil (lower tier) and had been certified to DALCO as such by Cities Service, thereby causing Western to pay a higher overall price for the crude oil purchased from DALCO than agreed to under the terms of the contract, to-wit: in excess of seven million dollars ($7,000,000) during the relevant time period.

(d) in concealing from Western the fact that Western was buying fraudulently certified crude oil, defendants would cause Western to unknowingly and unwittingly pass on the fraudulent certifications to subsequent purchasers, affecting the price paid by subsequent purchasers of the crude oil, and thereby causing Western and each subsequent seller of the crude oil, should the fraudulent certifications be discovered, to become potentially liable to its immediate purchaser for reimbursement.

(e) In order to give the false impression to anyone, including auditors or FEA/DOE examiners, that DALCO was attempting or had attempted to balance DALCO's discrepancy in crude oil certifications with foreign crude oil purchases, defendants would create fictitious entries and writings in the books and records of DALCO all in the following manner:

(i) the defendants knowingly caused fictitious journal entries in the books of DALCO, INC., indicating that a $275,000 commission was owed to a Houston, Texas company for that company's efforts in securing for DALCO a source of foreign crude oil as well as a source of smaller amounts of domestic crude oil;

(ii) in support of the fictitious journal entries, defendants knowingly created a fictitious invoice from the Houston, Texas company which invoice billed DALCO for the $275,000 commission; and

(iii) in further support of the fictitious journal entries, defendants knowingly created a sham letter which letter was addressed to a foreign crude oil trader which letter referred to the fictitious $275,000 commission and to DALCO's attempts to buy foreign crude oil.

(f) By creating and then concealing fraudulent certifications on domestic crude oil and placing them into the downstream sale and delivery of such crude oil, defendants would by deceit, fraud, and trickery frustrate and hamper the efforts of the FEA and later the DOE to monitor, control, determine, and regulate the maximum lawful selling price of the crude oil in question for DALCO, Western, and any other subsequent purchasers of the crude oil.

(g) The defendants would use and cause to be used the United States mails for the purpose of executing this scheme and artifice to defraud Western and others unknown.

(h) The defendants would transmit and cause to be transmitted certain writings and signals by means of wire communications in interstate commerce for the purpose of executing this scheme and artifice to defraud Western and others unknown.

D. OVERT ACTS

20. In furtherance of the aforesaid conspiracy and in order to effect the objects thereof, defendants W. DARRELL ZANG and LOUIS PORTER did, in the Norther District of Oklahoma and elsewhere, commit among others the following overt acts:

(a) On or about December 7, 1976, W. DARRELL ZANG signed a contract with Western whereby Western agreed to buy from DALCO approximately 10,000 barrels per day of West Texas sour crude oil for the month of December, 1976.

(b) On or about May 18, 1977, W. DARRELL ZANG signed a contract with Western whereby Western agreed to buy from DALCO approximately 19.000 barrels per day of West Texas sour crude oil for the months of June and July, 1977.

(c) On or about August 14, 1977, W. DARRELL ZANG signed a contract with Western whereby Western agreed to buy from DALCO approximately 15,000 barrels a day in September, 1977, 10,000 barrels a day in October, 1977, 15,000 barrels a day in November, 1977, and 20,000 barrels a day in December, 1977 of West Texas sour crude oil.

(d) On or about August 12, 1977, W. DARRELL ZANG signed a contract with Cities Service whereby DALCO agreed to buy 6,500 barrels a day of West Texas intermediate crude oil for the month of August, 1977.

(e) On or about January 21, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 1-7736 in the amount of $3,611,500.00 to be sent to Western for crude oil sold in December, 1976.

(f) On or about July 29, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 7-1577 in the amount of $208,811.03 to be sent to Western for crude oil sold in June, 1977.

(g) On or about July 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 5-1577B in the amount of $4,715,491.83 to be sent to Western for crude oil sold in June, 1977.

(h) On or about August 11, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 8-1477 in the amount of $897,833.78 to be sent to Western for crude oil sold in July, 1977.

(i) On or about August 11, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 8-1377 in the amount of $5,648,576.88 to be sent to Western for crude oil sold in July, 1977.

(j) On or about September 13, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice 9-1477 in the amount of $2,734,233.38 to (be) (sic) sent to Western for crude oil sold in August, 1977.

(k) On or about September 13, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 9-1577 in the amount of $1,911,018.07 to be sent to Western for crude oil sold in August, 1977.

(l) On or about October 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 10-1977 in the amount of $4,019,219.21 to be sent to Western for crude oil sold in September, 1977.

(m) On or about October 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 10-1777 in the amount of $1,054,098.66 to be sent to Western for crude oil sold in September, 1977.

(n) On or about October 14, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 10-1877 in the amount of $1,168,623.97 to be sent to Western for crude oil sold in September, 1977.

(o) On or about November 21, 1977, W. DARRELL ZANG caused a TELEX message amounting to an invoice from

DALCO CRUDE, INC. in the amount of $8,851,589.41 to be sent to Western for crude oil sold in October, 1977.

(p) On or about December 12, 1977, W. DARRELL ZANG caused DALCO CRUDE, INC. Invoice No. 12-0177 in the amount of $7,266,188.47 to be sent to Western for crude oil sold in November, 1977.

(q) On or about January 12, 1978, W. DARRELL ZANG caused DALCO INC. Invoice No. C-0104 in the amount of $9,042,948.00 to be sent to Western for crude oil sold in December, 1977.

(r) On or about February 13, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice C-0106 in the amount of $5,998,004.00 to be sent to Western for crude oil sold in January, 1978.

(s) On or about March 12, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0112 in the amount of $1,358,364.00 to be sent to Western for crude oil sold in February, 1978.

(t) On or about April 18, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0122 in the amount of $1,499,269.69 to be sent to Western for crude oil delivered in March 1978.

(u) On or about May 12, 1978, W. DARRELL ZANG caused a TELEX message to be sent to Western indicating that DALCO, INC. had sent invoices to Western in the total amount of 2,607,653.15 for crude oil sold in April, 1978.

(v) On or about June 12, 1978, W. DARRELL ZANG, caused DALCO, INC. Invoice No. C-0134 in the amount of $2,999,840.97 to be sent to Western for crude oil sold in May, 1978.

(w) On or about August 11, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0142 in the amount of $2,918,193.32 to be sent to Western for crude oil sold in June, 1978.

(x) On or about August 11, 1978, W. DARRELL ZANG caused DALCO, INC. Invoice No. C-0151 in the amount of $3,096,512.56 to be sent to Western for crude oil sold in July, 1978.

(y) On or about September 8, 1978 LOUIS PORTER caused Sharon Hamm to type a letter addressed to Falcon Petroleum Ltd., in Hamilton, Bermuda.

All in violation of Title 18 United States Code, Section 371.

COUNTS 2 THROUGH 7

1. Paragraphs 1 through 17 and 19 of Count 1 are hereby realleged and incorporated as though set forth in full herein, as constituting and describing defendants' scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses and representations.

2. On or about the dates set forth below, within the Northern District of Oklahoma, defendants

W. DARRELL ZANG and LOUIS PORTER

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, knowingly did cause to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service to the addresses listed below, according to the directions thereon, the following items:

Counts	Date	Addressee	Items Mailed
2	8-11-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 8-1377 in the amount of $5,648,576.88 for crude oil delivered in July, 1977
3	9-13-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 9-1477 in the amount of $2,734,233.38 for crude oil delivered in August, 1977
4	10-14-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 10-1977 in the amount of $4,019,219.21 for crude oil delivered in September, 1977
5	12-12-77	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Crude, Inc., Invoice No. 12-0177 in the amount of $7,266,188.47 for crude oil delivered in November, 1977
6	1-12-78	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Inc., Invoice No. C-0104 in the amount of $9,042,948.00 for crude oil delivered in December, 1977
7	2-13-78	Western Crude Oil P.O. Box 5568 Denver, Co. 80217	Dalco Inc., Invoice No. C-0108 in the amount of $5,998.004.00 for crude oil delivered in January, 1978

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNTS 8 THROUGH 15

1. Paragraphs 1 through 17 and 19 of Count 1 are hereby realleged and incorporated as though set forth in full herein, as constituting and describing defendants' scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses and representations.

2. On or about the dates set forth below in the Northern District of Oklahoma, the defendants

W. DARRELL ZANG and LOUIS PORTER

for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, did transmit and cause to be transmitted certain signs, signals, and sounds in interstate commerce by means of wire communications in that they caused wire transfers of funds from the Continental National Bank in Chicago, Illinois, to the Fourth National Bank in Tulsa, Oklahoma, for deposit in accounts assigned to DALCO CRUDE, INC., DALCO, INC., and/or The Bank of Montreal, as set forth below:

Count (sic)	Aproximate Date of Transfer	Amount of Deposit
8	7-22-77	$4,915,244.36
9	11-21-77	$8,851,589.41
10	3-23-78	$1,350,664.00
11	4-28-78	$1,494,102.60
12	5-22-78	$2,607,653.15
13	6-22-78	$2,999,840.97
14	7-17-78	$2,918,193.32
15	8-21-78	$3,096,512.56

All in violation of Title 18, United States Code, Sections 1343 and 2.

COUNT 16

1. Paragraphs 1 through 17 and 19 of Count 1 are hereby realleged and incorporated as though set forth in full herein.

2. From approximately June, 1977, to December, 1977, in the Northern District of Oklahoma, the defendants

W. DARRELL ZANG and LOUIS PORTER,

having received monies derived directly or indirectly from a pattern of racketeering, did willfully and knowingly use and invest, directly or indirectly, a part of such income and the proceeds of such income in acquisition of an interest in and the establishment and operation of DALCO INVESTMENTS, an enterprise which was engaged in interstate commerce and in activities which affected interstate commerce, in violation of Title 18, United States Code, Section 1962(a).

3. As defined by Title 18, United States Code, Sections 1961(1)(B) and 1961(5), the pattern of racketeering activity consisted of and included each and all of the Federal crimes of mail fraud and wire fraud alleged in Counts 2 through 5 and 8 and 9 of this Indictment, the allegations of which are hereby incorporated by reference as if fully set forth herein.

4. Among the methods used by defendants to carry out the acquisition, establishment, and operation of the enterprise was to transfer to DALCO INVESTMENTS out of the gross profit obtained from the Cities Service to Western transactions approximately $1,067,576.00.

5. Through the aforesaid pattern of racketeering activity and the aforesaid investment and use of income received from the pattern of racketeering, defendant ZANG did acquire, establish and maintain his fifty per cent (50%) interest in the enterprise, including his fifty per cent (50%) interest in the office building at 2431 East 51 Street, Tulsa, Oklahoma, which building is owned exclusively as an asset of DALCO INVEST-

MENTS, thereby making his fifty per cent (50%) interest in DALCO INVESTMENTS, including his fifty percent (50%) interest in the aforedescribed office building, subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1).

6. Through the aforesaid pattern of racketeering activity and the aforesaid investment and use of income received from the pattern of racketeering, defendant PORTER did acquire, establish and maintain his fifty per cent (50%) interest in the enterprise, including his fifty per cent (50%) interest in the office building at 2431 East 51 Street, Tulsa, Oklahoma, which building is owned exclusively as an asset of DALCO INVESTMENTS, thereby making his fifty per cent (50%) interest in DALCO INVESTMENTS, including his fifty per cent (50%) interest in the aforedescribed office building, subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1).

All in violation of Title 18, United States Code, Section 1962(a), 1963 and 2.

A TRUE BILL

S/S John E. Burleigh
Foreman of the Grand Jury

S/S Hubert H. Bryant
HUBERT H. BRYANT
United States Attorney

S/S Stephen P. Learned
Stephen P. Learned
United States Department of Justice

S/S R M F
Richard M. Fishkin
United States Department of Justice

APPENDIX D

The defendants in this case are in essence accused of improperly certifying crude oil by certifying oil in a manner different from the manner in which they purchased it. In that regard, you are instructed that the certification requirements do not specifically require a reseller to certify out what comes in. That is, there is no language in the Federal Energy Regulations which specifically requires a reseller to trace his certification with specific barrels of oil.

You are further instructed that Federal Energy Regulations do not specifically define what constitutes improper certification.

Defendant, W. Darrell Zang's Instruction Number _____.

Approved:

_____

Disapproved:

_____

You have heard testimony regarding the inter-relationship between pricing regulations and certification regulations. You've heard testimony from an expert to the effect that a reseller could charge any price with respect to crude oil sales as long as the reseller's average mark-up for all crude sales a month did not exceed his historical average mark-up.

The defendant, Zang, has testified that he interpreted these pricing provisions to mean that the ceritification's corresponding sales prices did not have to match on specific transactions. You are instructed that if you find from the evidence that this interpretation was reasonable given the pricing and certification provisions then the defendants cannot be found to have willfully, intentionally and fraudently violated Federal Energy Regulations.

Defendant, W. Darrell Zang's Instruction Number _____.
Based on 10 C.F.R. Section 212.185C and 10 C.F.R. Section 212.131B

Approved:

_____

Disapproved:

_____

APPENDIX E

15 USCS § 754

§ 754 Administration and enforcement; penalties; delegation of authority

(a)(1)Except as provided in paragaph (2), (A) sections 205 through 207 and section 209 through 211 of the Economic Stabilization Act of 1970 [12 USCS § 1904 note] (as in effect on the date of enactment of this Act [Nov. 27, 1973]) shall apply to the regulation promulgated under section 4(a) [15 USCS § 753(a)], to any order under this Act [15 USCS §§ 751 et seq.], and to any action taken by the President (or his delegate) under this Act [15 USCS §§ 751 et seq.], as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970 [12 USCS § 1904 note]; and (B) sections 212 (other than 212(b)) and 213 of such Act [12 USCS § 1904 note] shall apply to functions under this Act [15 USCS §§ 751 et seq.] to the same extent such sections apply to functions under the Economic Stabilization Act of 1970 [12 USCS § 1904 note].

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act [12 USCS § 1904 note] shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this Act [15 USCS §§ 751 et seq.], and shall not effect any authority under sections 212 and 213 [12 USCS § 1904 note] insofar as such authority is made applicable to functions under this Act [15 USCS §§ 751 et seq.].

(3)(A) Whoever violates any provision of the regulation under section 4(a) of this Act [15 USCS § 753(a)], or any order under this Act [15 USCS §§ 751 et seq.] shall be subject to a civil penalty–

(i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation and

(iii) with respect to activities–

(I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or

(II) activities not referred to in clause (i) or (ii) of subclause (I) of this clause of not more than $2,500 for each violation.

(B) Whoever willfully violates any provision of such regulation, or any such order shall be imprisoned not more than 1 year, or–

(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;

(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;

(iii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum

product at the retail level or any other person shall be fined not more than $10,000 for each violation; or both.

(4) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President.

(b) The President may delegate all or any portion of the authority granted to him under this Act [15 USCS §§ 751 et seq.] to such officers departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate.

(Nov. 27, 1973, P. L. 93-159, § 5, 87 Stat. 633; Dec. 22, 1975, P. L. 94-163, Title IV, Part B, § 452, 89 Stat. 949.)

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

(June 25, 1948, ch 645, § 1, 62 Stat. 684; Oct. 31, 1951, ch 655, § 17b, 65 Stat. 717.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, ch 645, § 1, 62 Stat. 701.)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

(June 25, 1948, ch. 645, § 1, 62 Stat. 763; May 24, 1949, ch 139, § 34, 63 Stat. 94; Aug. 12, 1970, P.L. 91-375, § 6(j)(11), 84 Stat. 778.)

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (Added July 16, 1952, ch 879, § 18(a), 66 Stat. 722; July 11, 1956, ch 561, 70 Stat. 523.)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interestate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after

such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section. Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter [18 USCS § 1962] shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962 [18 USCS § 1962], and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 [18 USCS § 1962].

(b) In any section brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the custom laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter [18 USCS §§ 1961 et seq.] by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.
(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

[¶ 15,531]

Sec. 212.131 Certification of domestic crude oil sales.

(a)(1) *Stripper well properties.* With respect to each stripper well property, the producer shall certify in writing to each purchaser of crude oil produced from that property:

(i) that the property concerned has qualified as a stripper well property; and

(ii) the average daily production per well for the 12 month period during which the property qualified as a stripper well property. The certification required under this paragraph (a)(1) of this section shall be made (i) within the consecutive two-month period immediately succeeding the month of September 1976, with respect to any property which qualified as a stripper well property during or before the month of September 1976, and (ii) with respect to any property which qualifies as a stripper well property during or after the month of October 1976, within the two month period immediately succeeding the first month that such property qualifies as a stripper well property.

(a)(2) *Non-stripper well properties.* (i) With respect to each sale of crude oil from a property which has not qualified as a stripper well property, the producer shall certify in writing to the purchaser the number of barrels, if any, of–

(A) lower-tier ("old") crude oil (separately identifying any California lower tier, crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California lower tier crude oil at the time of the sale);

(B) upper-tier ("new") crude oil (separately identifying any California upper tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such

California upper tier crude oil at the time of the sale), excluding any crude oil transported through the trans-Alaska pipeline;

(C) crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper crude oil and ANS crude oil that is not subject to the ceiling price limitations of this Part); and

(D) incremental tertiary crude oil as determined pursuant to § 212.78;

(E) tertiary incentive crude oil as determined pursuant to §212.78; and

(F) newly discovered crude oil as determined pursuant to § 212.79.

With respect to any property (except a property with respect to which any amount of crude oil is or at any time has been certified by the producer as incremental tertiary crude oil) which has not qualified as a stripper well property, and from which crude oil is only sold to one purchaser, the requirements of paragraph (a)(2)(i) may be complied with by a one-time certification to the purchaser of the property's monthly base production control level determined pursuant to § 212.72, whether based upon production and sale of crude oil in 1972, upon production and sale of old crude oil in 1975, or upon production and sale of old crude oil during the six-month period ending March 31, 1979, and, if applicable, either the property's adjusted base production control level determined pursuant to § 212.76 or the information necessary to compute such adjusted base production control level pursuant to § 212.76; *provided, however,* that the producer shall certify to the purchaser the amounts and gravity of California lower tier crude oil and California upper tier crude oil in each sale.

(ii) With respect to each property which has not qualified as a stripper well property, the producer shall certify in writing once to each purchaser of crude oil produced and sold from that property;

(A) the highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; and

(B) the highest posted price on September 30, 1975 for transactions in that particular grade of crude oil in that field in September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

(iii) The certification required under this paragraph (a)(2) of this section shall be made within the consecutive two-month period immediately following the month of September 1976, or, with respect to any property from which crude oil has not been produced and sold prior to September 30, 1976, the certification required under this paragraph (a)(2) of this section shall be made within the two-month period immediately following the first month in which crude oil is produced and sold. With respect to any property for which a base production control level is determined pursuant to the provisions of subparagraph (c)(1) of the definition of "Base production control level," the certification required under this paragraph (a)(2) of this section shall be made on or before December 31, 1979.

(a)(3) *Unitized properties.* (i) With respect to each sale of crude oil from a unitized property for which the producer has

determined a unit base production control level, the producer shall certify in writing to the purchaser the number of barrels of –

(A) lower-tier ("old") crude oil (separately identifying any California lower tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California lower tier oil at the time of the sale);

(B) upper-tier ("new") crude oil, if any (separately identifying any California upper tier crude oil, as defined in § 212.62 of Part 211 of this chapter, and the gravity in degrees API of such California upper tier crude oil at the time of the sale), including either "actual new crude oil" or "imputed new crude oil" determined pursuant to § 212.75(b), but excluding any crude oil transported through the trans-Alaska pipeline;

(C) crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper tier crude oil and ANS crude oil that is not subject to the ceiling price limitations of this Part), if any;

(D) incremental tertiary crude oil determined pursuant to § 212.78;

(E) tertiary incentive crude oil as determined pursuant to § 212.78.

(F) imputed stripper well crude oil, if any, determined pursuant to § 212.75(b); and

(G) imputed newly discovered crude oil, if any, determined pursuant to § 212.75(b).

With respect to any unitized property (except such a property with respect to which any amount of crude oil is or at any time has been certified by the producer as incremental tertiary crude oil) for which the producer has determined a unit base produc-

tion control level, and from which crude oil is only sold to one purchaser, the requirements of this paragraph (a)(3)(i) may be complied with by a one-time written certification to the purchaser of—

(*1*) the monthly unit base production control level, determined pursuant to § 212.75(b) or (h);

(*2*) the number of barrels of "imputed new crude oil," if any, determined pursuant to § 212.75(b), excluding any crude oil transported through the trans-Alaska pipeline;

(*3*) the number of barrels of crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper tier crude oil and ANS crude oil that is not subject to the ceiling price limitations of this Part), if any;

(*4*) the number of barrels of imputed stripper well crude oil, if any, determined pursuant to § 212.75(b); *provided, however,* that the producer shall certify to the purchaser the amounts and gravity of California lower tier crude oil and California upper tier crude oil in each sale.

(ii) With respect to each unitized property for which the producer has determined a unit base production control level, the producer shall certify in writing once to each purchaser of crude oil produced from the property:

(A) the highest posted price at 6 a.m., local time, May 15, 1973, for transactions in that grade of crude oil in that field, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted; and

(B) the highest posted price on September 30, 1975, for transactions in that particular grade of crude oil in that field in

September 1975, or if there was no posted price in that field for that grade of domestic crude oil, the related price for that grade of domestic crude oil which is most similar in kind and quality in the nearest field for which prices were posted.

(iii) The certification required under this paragraph (a)(3) of this section shall be made within the consecutive two-month period immediately following the month of September 1976, or, with respect to any unitized property for which a unit base production control level has not been established prior to September 30, 1976, the certification required under this paragraph (a)(3) of this section shall be made within the consecutive two-month period immediately following the first month in which such unit base production control level is established. With respect to any unitized property for which a unit base production level is established pursuant to the provisions of § 212.75(h), the certification required under this paragraph (a)(3) of this section shall be made on or before December 31, 1979.

(4) *Other domestic crude oils the first sale of which is exempt from this part.* (i) With respect to each sale of crude oil exempt from the provisions of this part, other than crude oil produced from a stripper well property, the producer shall certify in writing once to each purchaser of crude oil produced and sold from that property that the first sale of crude oil produced and sold from that property is exempt from the provisions of this part.

(ii) For purposes of this paragraph (a)(4), domestic crude oil the first sale of which is exempt from the provisions of this part includes U.S. owned petroleum sold by the Secretary of the Navy under the Naval Petroleum Reserves Production Act of 1976 (Pub. L. 94-258); and crude oil produced from heavy oil

property as defined in section 212.59 of this Part; but domestic crude oil of the first sale of which is exempt from this part does not include incremental tertiary crude oil or tertiary incentive crude oil determined pursuant to § 212.78.

(5) *New purchasers.* With respect to any purchaser which has not purchased crude oil from the property (or the unitized property) concerned prior to September 30, 1976 the certifications required under paragraphs (a)(1), (a)(2), and (a)(3) of this section shall be made within the consecutive two-month period immediately following the first month in which such purchaser purchases crude oil from that property or unitized property.

(b)(1) Each seller of domestic crude oil, other than a producer of domestic crude oil covered by paragraph (a) of this section, shall, with respect to each sale of domestic crude oil other than an allocation sale pursuant to § 211.65 of Part 211, or a sale in which no volumes of domestic crude oil are deemed to have been transferred pursuant to § 211.67(g) of Part 211, certify in writing to the purchaser the respective volumes of and respective per barrel prices for the–

(i) lower-tier ("oil") crude oil (separately identifying any California lower tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California lower tier crude oil at the time of the sale);

(ii) upper-tier ("new") crude oil (separately identifying any California upper tier crude oil, as defined in § 211.62 of Part 211 of this chapter, and the gravity in degrees API of such California upper tier crude oil at the time of the sale), exclusive of any crude oil transported through the trans-Alaska pipeline;

(iii) crude oil transported through the trans-Alaska pipeline (separately identifying ANS upper tier crude oil and ANS crude

oil that is not subject to the ceiling price limitations of this Part);

(iv) stripper well crude oil;

(v) incremental tertiary crude oil;

(vi) tertiary incentive crude oil; and

(vii) other domestic crude oils the first sale of which is exempt from the provisions of this part – included in the volume of domestic crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part.

(2) Each seller of domestic crude oil, other than a producer of domestic crude oil, shall make the certification required by this paragraph as soon as practicable after receipt of the required certifications from its sellers, but in no event later than 30 days following such receipt. However, if the domestic crude oil is not sold until after the expiration of the thirty-day period, the certification required by this paragraph shall be made within ten days following the sale of the domestic crude oil.

(3) All certifications required by this paragraph shall relate only to the actual volumes of crude oil included in any mixed blend of crude oil and other refined petroleum products and residual fuel oil.

(c) No firm may sell domestic crude oil unless it provides the certification required by this section. No firm may knowingly purchase domestic crude oil for which there is no certification as required by this section; provided, however, that the provisions of this paragraph do not apply to the sale of domestic crude oil to a firm under circumstances of economic or other coercion in which the buyer, because of its need for crude oil, had no reasonable alternative but to purchase the domestic

crude oil for which there is no certification, and such firm promptly reports the purchase to the Federal Energy Administration for investigation.

(d) All certifications required by this section shall be in writing, either upon an invoice or billing or by separate instrument, and shall be effective only when delivered to and received by the purchaser of domestic crude oil.

Rule 31. Verdict

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(e) Criminal forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

(Dec. 26, 1944, eff. Mar. 21, 1946 as amended Apr. 24, 1972, eff. Oct. 1.)

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 801. Definitions

The following definitions apply under this article:

(a) **Statement.** – A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** – A "declarant" is a person who makes a statement.

(c) **Hearsay.** – "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** – A statement is not hearsay if –

(1) **Prior statement by witness.** – The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

(2) **Admission by party-opponent.** – The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a state-

ment concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) **Public records and reports.** – Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.